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The Penal Action

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enjoy the distinction and the honor of adding to the sum of human knowledge. Our criminal law is as old as our civilization, and innovations are not welcomed generally by the profession, yet certain genuine reforms are demanded. There is no body of men in the State as well equipped as you are for preparing these reforms in our criminal procedure, or whose opinions would have greater weight with the legislature. The question of improving our practice under existing laws or the laws as amended, rests entirely with you. This is a great opportunity for you to serve the people of your State. The opportunity, the responsibility, the honor, are all yours. If you have the desire, you will find the way.

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THE PENAL ACTION.

Address Delivered by Honorable Charles Carroll, of Bullitt County, Before the Commonwealth's Attorneys' Association of Kentucky, December 28th, 1916.

Mr. President and Members of the Association:

I have long since learned that a long talker is an abomination to his hearers, and will govern myself accordingly.

Actions of this character are of ancient origin and are treated at some length by our old and neglected friend, Blackstone, in his entertaining work, "Commentaries on the Laws of England." It appears from this venerable and learned writer that in ancient days penal actions in nature of informations were of two sorts: First, those which were partly at the suit of the King and partly at that of a subject; and second, such as were only in the name of the King. The first were brought upon penal statutes which inflicted a penalty upon conviction, part of the penalty going to the King, the other part to the informer, and it seems they were carried on by criminal instead of civil process. Of the second character of actions, there were two kinds; one of which was brought in the name of the King by the Attorney General, and another on the relation of some private person or common informer, and were filed by the King's Coroner and Attorney (usually called the "Master of the Crown Office"), in the Court of King's Bench.

The object of the King's own prosecutions instituted by his Attorney General was against such enormous misdemeanors as tended to disturb or endanger the government, and to prevent any delay in the prosecution by referring the matter to any other tribunal, namely, the investigation of a Grand Jury. The other character of information, filed by the Master of the Crown Office, upon complaint or relation of a private subject, was for gross or notorious misdemeanors, riots, batteries and the like, not particularly tending to disturb the government, but which deserved punishment. When such information was filed, either by the Attorney General or Master of the Crown Office, the accused must be tried by a petty jury of the county where the offense was committed.

It appears, however, that this method of prosecution was diverted by King Henry VII. into an instrument for the collection of money, because Blackstone says that in his reign his ministers "were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations, and for this purpose the Court of Star Chamber was armed with the most dangerous and unconstitutional powers over the persons and properties of the subjects." Various means were resorted to for the purpose of multiplying fines and pecuniary penalties, and, as in the Star Chamber proceeding no jury was impanelled, there was very little difficulty in the ministers of the King finding proof sufficient to convict the accused.

The system of prosecutions by information or penal action as distinguished from prosecutions by indictment, has been in force in Kentucky for a great many years, and has been the occasion of many decisions by our Court of Appeals. By Section 1139 of the Kentucky Statutes, it is provided:

> "Fines and Forfeitures Inure to Commonwealth—Exceptions—Penal Action.—All fines and forfeitures which may be imposed by law shall inure and vest in the Commonwealth, except in cases where, by law, the whole or a part thereof, shall be given to a person or to some particular object, and

may be recovered by civil procedure before any judicial tribunal having jurisdiction, or upon indictment of a grand jury."

And by Section 11 of the Civil Code, it is provided:

"Offenses That May Be Prosecuted by Penal Action.—A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the Commonwealth of Kentucky, or in the name of an individual or corporation, if the whole fine be given to such individual or corporation. The proceedings in penal actions are regulated by the Code of Practice in civil actions."

Whether suit under either of those sections should be considered a criminal or civil action has been a fruitful source of controversy, and the Court of Appeals of the State has held that a penal action is both a criminal prosecution and a civil action.

There are a few leading cases in this State upon the question, to which I will call attention:

The first is that of the Commonwealth vs. Avery, in 14 Bush, beginning on page 625. It appears from a reading of the case that Mr. Avery was very certain that a certain gentleman would be elected Mayor of the city of Louisville, and one, Hays, was equally certain that he would not. This difference of opinion led to the making of an alleged $10,000 bet on the result. Avery won, and it was claimed that he received the $10,000, and all this being contrary to the statutes of Kentucky, made and provided, the Commonwealth sued to recover from Brother Avery his winnings. The suit was filed in the Jefferson Court of Common Pleas, and a demurrer was filed and sustained to the jurisdiction of this court, upon the theory that the proceeding was a criminal proceeding and the Common Pleas Court, being one of exclusively civil jurisdiction, it had no right to pass upon the question, but our Court of Appeals held that the proceeding was one in the nature of an action for debt, and was a civil action, and the Common Pleas Court had jurisdiction, and the judgment of the lower court sustaining the demurrer was reversed and the case remanded for further proceedings.

My curiosity was aroused upon reading the case, and I made

some investigation as to its final disposition, and discovered that Mr. Avery raised divers and sundry questions upon the return of the case to the lower court and the proceeding dragged along and was eventually dismissed, and Brother Avery was left in the enjoyment of the money which his superior political knowledge or luck gained for him.

The next case of importance on the subject is that of Louisville & Nashville Ry. Co. vs. Commonwealth, 112 Ky., beginning on page 635. This case was a penal action by the Commonwealth against the railroad company, for suffering gaming on one of its cars. In that case it was held, "It has been the policy of the State from its foundation to punish many minor offenses without indictment. The summary proceeding was essential to the welfare of society, and has by common consent been adopted to a greater or less extent in all of the states," and the court held in that case, that although the proceeding was in the nature of a civil proceeding, the only plea that was required of the defendant was that of Not Guilty, and the guilt of the defendant must be proved beyond a reasonable doubt before a verdict could be returned against him.

The plea of not guilty, and the reasonable doubt doctrine, apply solely to criminal actions, and under this decision a penal action would be regarded as a criminal action.

The question of penal action was again before the court in James vs. Helm, 129 Ky., page 323. In that case the Governor had employed Helm, a Louisville lawyer, to institute penal actions against certain saloon keepers, who it was alleged were violating the Sunday Closing Law in the city of Louisville, and agreed to pay Helm for his serviecs $4,000.

Numerous penal actions were instituted by Helm against saloon keepers, and after various trials and mis-trials, an agreement was entered into by which it was stipulated if the prosecutions ceased, the saloon keepers would obey the law. Thereupon the cases were no further prosecuted, and the opinion says that the Sunday Closing law was no longer violated. Helm demanded his fee, and the Auditor refused to issue a warrant for same, on the ground that the Governor was without authority to employ

counsel. Helm then instituted mandamus proceedings to compel the Auditor to issue a warrant, and the sole question involved was whether or not a penal action was a civil or a criminal proceeding, because, if a criminal proceeding, the Governor was without authority to employ a lawyer to assist in a criminal prosecution; if it was a civil proceeding, then the Governor had authority to employ a lawyer to assist. The Court of Appeals held that a penal action was a civil proceeding, and Helm got his fee.

The question was again before the court in the case of Commonwealth vs. Prall, 146 Ky., beginning on page 109. This was a penal action instituted by the Commonwealth to recover of Prall a fine for damaging a public road (the punishment for said act being a fine not exceeding $100). A trial was had and Prall was acquitted. Thereupon the Commonwealth took the case to the Court of Appeals, and the Court of Appeals reversed the judgment of acquittal, and remanded the case for a new trial (see 144 Ky., page 577). This naturally created great consternation and indignation in the heart of Prall's counsel, and he immediately petitioned for a rehearing, claiming that his client's inalienable constitutional right of former jeopardy had been basely assailed, and denied that the Court of Appeals or any other court had power or authority to compel his client to stand trial again for an offense for which he had been once tried and acquitted. The Court of Appeals delivered a response to this petition for rehearing, which will be found on pages 110 to 118 inclusive of 146 Ky., and the question of what constitutes a penal action is gone into extensively, and the court came to the conclusion that a penal action was a civil action and that the doctrine of former jeopardy did not apply, and overruled the petition for a rehearing, and Prall again faced a jury of his countrymen, and this time, sad to relate, he was found guilty, and paid his fine without any appeal or petition for rehearing.

The question came again before the Court of Appeals in International Harvester Company vs. Commonwealth, 161 Ky., page 49. This grew out of various prosecutions against the International Harvester Company, a many-headed monster manufacturing farming implements, and selling them to the farmers of the

State at a price greatly in excess of their real value (as the farmers thought) and in violation of our anti-trust law. Numerous trials were had and resulted in numerous convictions. Several test cases were taken to the Court of Appeals and there affirmed. The Harvester Company appealed to the Supreme Court of the United States, and, sad to say, the Supreme Court reversed the decision of our Court of Appeals, and held that our trust law, upon which the prosecutions were based, was void for uncertainty.

After this decision, and within two years from the time the verdict and judgments were rendered in the lower courts, in a number of those prosecutions, the Harvester Company appealed from those various judgments to the Court of Appeals. The Commonwealth moved to dismiss the appeals, insisting that under sections 347 and 348 of the Criminal Code the transcript of record in each case should be filed in the office of the Clerk of the Court of Appeals within 60 days after the rendition of the judgment, as a condition precedent to the right of appeal. The sections referred to give the Court of Appeals jurisdiction in cases where a fine is imposed exceeding $50.00, provided the record is filed within 60 days from the rendition of the judgment. The Harvester Company contended that the appeal was regulated by section 355 of the Criminal Code, which says: "If the prosecution be by a penal action, the appeal shall be similar in all respects to appeals in civil actions." The Commonwealth insisted that this section applied only to the procedure after the appeal was taken, and did not regulate the time of the taking of the appeal, and did not give the defendant in a penal action two years to file his transcript, as is given an appellant in civil action, but the Court of Appeals held otherwise and again decided that penal actions were civil proceedings.

Then, the last case upon this subject is the case of the American Express Company vs. Commonwealth, which is found in 171 Ky., page 1. This was a proceeding by penal action against the American Express Company to recover a fine imposed upon it for delivering intoxicating liquors to the consignee in a local option precinct, knowing the liquor was intended to be used in violation of the prohibition law. The actions were founded upon the act of 1914, now section 4569b, Kentucky Statutes.

In that case it was insisted for the Commonwealth that as the court had frequently declared a penal action was a civil action, that a verdict of three-fourths of the jury was sufficient, but the court refused to take this view and held that under the law a unanimous verdict was necessary and that penal actions were not civil actions within the meaning of section 248 of the Constitution, which permits a verdict by three-fourths of a jury, and said that the civil actions therein referred to do not embrace penal actions which are of a quasi criminal nature.

In L. & N. vs. Commonwealth, 112 Ky., the court said, "But this court has regarded proceedings for offenses punishable by fine only as of quasi civil nature." Whether a proceeding can be of a quasi criminal nature and of a quasi civil nature at one and the same time, I am unable to say. However that may be, the latest utterance makes a penal action a quasi criminal action, and in the American Express Company case the court again held that the only plea required of defendant was Not Guilty, and that the jury must be instructed to believe the guilt of the defendant beyond a reasonable doubt before conviction.

In Small & Co. vs. Commonwealth, 134 Ky., page 272, it is held that where a penalty is both a fine and imprisonment, if the offense is committed by a corporation, then the imprisonment portion can be ignored and a penal action maintained for the fine.

It was held in Commonwealth vs. L. & N. R. R. Co., 18 Law Reporter, page 610, and in other cases following it, down to Harp vs. Commonwealth, 139 Ky., page 409, that where an offense is created by statute, the punishment for which is a fine, and the statute provides that the proceeding must be by indictment, then a penal action will not lie to recover the fine against an individual or corporation.

I conclude from the various decisions of our Court of Appeals that a penal action may be maintained against an individual.

First, for the commission of an offense, the punishment of which is a fine, unless the act creating the offense provides the proceeding must be by indictment.

Second, against any corporation for a misdemeanor, where the punishment, if against an individual, would be a fine and imprison-

ment, or either, unless the statute limits the proceeding to an indictment.

Third, that the action is begun by filing a petition in the circuit court, or other court of competent jurisdiction, setting up the facts which constitute a violation of the law, and praying judgment against the defendant for the maximum fine imposed.

Fourth, that upon a trial, the defendant, by a plea of Not Guilty, puts in issue every material allegation of the petition.

Fifth, that the jury must be instructed to find the defendant guilty beyond a reasonable doubt.

Sixth, that a unanimous verdict is necessary.

Seventh, if a defendant is convicted and desires an appeal to the Court of Appeals, he has two years in which to file the transcript of record in the office of the clerk of that court.

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HOW TO EXPLAIN TO YOUR CLIENT WHY YOU LOST HIS CASE.

By E. Polk Johnson.

In response to a request of the Editor that I prepare an article for early publication in the Kentucky Law Journal, I am forced to appear in court with a plea for a continuance on the ground that I have not had time to prepare my case. It seems fortunate, however, that there is an opportunity afforded to supply the lack of an article of my own by something far more interesting from the pen of another, even though the article has already appeared in print. To every young lawyer, and especially to the students who hope soon to surprise the bench, the bar and their clients with their forensic knowledge and eloquence, the article in question is worthy of the most careful study. In the "Reminiscences of Gen. Basil W. Duke," the following is found:

> "Some thirty or more years ago, Byron Bacon, a member of the Louisville bar, at a meeting of the Kentucky Bar Association responded to the toast: 'How to Explain to Your Client Why You Lost His Case.'"

The fact that the response was delivered so long ago, renders it fresh today, if a paradoxical statement be permitted. As Gen.